Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-106

PLEASANT RICHARD TALLY,
(a/k/a DICK TALLY),

Petitioner,

versus

WILLIAM P. JOHNSON, HOMER WILLIAMS
AND AUBREY W. GILBERT, DECEASED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON, HOMER WILLIAMS AND AUBREY W. GILBERT IN OPPOSITION

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PLEASANT RICHARD TALLY,
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Petitioner,

versus

WILLIAM P. JOHNSON, HOMER WILLIAMS AND AUBREY W. GILBERT, DECEASED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON, HOMER WILLIAMS AND AUBREY W. GILBERT, IN OPPOSITION

TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Aubrey W. Gilbert, deceased, William P. Johnson and Homer Williams, respectfully request that the Supreme Court of the United States deny the Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in Civil Action File No. 78-3694, rendered on April 24, 1979.

OPINIONS BELOW

The Order of the District Court of the Northern District of Georgia granting Respondents' motion to dismiss Petitioner's second suit and the Judgment of the Court dismissing that case entered on June 15, 1978, are found in Appendix A of Petitioner's Brief.

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered on April 24, 1979, affirming the Judgment of the District Court in the case identified above is found in Petitioner's Brief in Appendix A.

JURISDICTION

Respondents respectfully submit that while Petitioner may apply for a Writ of Certiorari in the present case the present matter is not a proper case for the granting of a petition for a Writ of Certiorari. The Fifth Circuit Court of Appeals properly applied the state law of the State of Georgia on the issue of res judicata as controlling in cases of this type and the Petitioner's

belated reliance on *Stump v. Sparkman*, 98 S.Ct. 1099 (1978), is misplaced and belated having been dealt with by both the Fifth Circuit Court of Appeals and this Court in the initial lawsuit. Elaboration on the position taken by the Respondents is reserved for the Argument and Citation portion of this Brief.

FEDERAL STATUTES

Federal Rules of Civil Procedure, Rule 12(b)(6) which provides:

> *"Rule 12. Defenses and Objections — When and How Presented By Pleading or Motion — Motion for Judgment on Pleadings*
>
> *(b) How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . ."

STATEMENT OF THE CASE

(a) The Proceedings Below:

The Petitioner's statement of the proceedings below are incomplete in many respects and inaccurate in at least one glaring respect. The Respondents will first make an effort to complete a Statement of the Proceedings Below.

The present action is the second action filed by the Petitioner against all three Respondents named above. Both actions were filed in the United States District Court for the Northern District of Georgia. (R-5, 335) In both actions, the Petitioner sought to recover damages he contends he suffered as a result of legal representation by two of the Respondents named above (William P. Johnson and Aubrey W. Gilbert) of himself and his wife in a State Court divorce action. (R-5, 335) It has never been denied in any of the pleadings filed in either suit that both of these actions arise from the same transaction and, in fact, the Trial Court's Order in the present case dismissing the Petitioner's Complaint enters a finding that Petitioner conceded that both actions arose from the same divorce proceeding. (R-944)

The first suit filed by the Petitioner was filed on March 2, 1977, and as amended, named as defendants the three Respondents identified above plus State Court Judge Lamar Knight. (R-335) That action is identified in the United States District Court for the Northern District of Georgia as Civil Action Case No. C77-359A. A copy of that first Complaint, as amended, is found in the Record at R-335. In that first action the Petitioner contended that the named defendants (Respondents herein), in the handling of the Petitioner's divorce action in the Superior Court of Carroll County, Georgia, defrauded the Petitioner and Petitioner based his claim on *42 United States Code 1983*, a civil rights section. (R-335) The United States District Court for the Northern District of Georgia dismissed

that first Complaint for failure to state a claim upon which relief could be granted as to all defendants. A copy of the Court's ruling in the first case is found in the Record at R-343. The United States Court of Appeals for the Fifth Circuit summarily affirmed the dismissal and the United States Supreme Court denied Petitioner's Petition for Certiorari. (R-346) In December of 1977, the Petitioner filed his second action, naming once again the three Respondents identified herein as defendants. (R-5) This action is identified for the United States District Court for the Northern District of Georgia as Civil Action Case No. C77-2008 A. (R-5) As in the first action, Petitioner again sought to recover damages which he contended occurred as a result of the legal representation afforded him and his wife in a divorce action in the Superior Court of Carroll County, Georgia. (R-5) The identical qualities of the two Complaints will be presented in detail in the *Argument and Citation* portion of this Brief.

On June 15, 1978, the United States District Court for the Northern District of Georgia granted Motions for Summary Judgment on behalf of all Respondents and dismissed this second action ruling in essence that the claim was barred under the *Doctrine of Res Judicata*. (R-944) Petitioner's Motion to Alter or Amend the Judgment was denied. (R-972) The United States Court of Appeals for the Fifth Circuit affirmed the Judgment of the District Court on April 24, 1979.

Petitioner contends that the first action is not a bar to the second action because the dismissal in the first ac-

tion for failure to state a claim upon which relief could be granted was, in his contention, jurisdictional. The Respondents will expect to demonstrate by this Brief that not only has the Petitioner misanalyzed the law, but Petitioner has misanalyzed the issue. Respondents will demonstrate that the issues of res judicata and collateral estoppel are controlled by applicable State law, a fact with which Petitioner has never dealt and that it was abundantly clear to the Trial Court and is abundantly clear now that under applicable Georgia Law with regard to res judicata, the present Complaint cannot be maintained.

Secondly, Respondents wish to point out to the Court that there is a glaring discrepancy in the Petitioner's Statement of the Proceedings Below. Petitioner contends in his Brief that the first action was dismissed by the Trial Court on the sole ground that it failed to state a cause of action merely because the Judge was found to be immune to suit. That is grossly inaccurate. The Trial Court's Order in the first case is found at R-343, and speaks for itself. That Order makes it abundantly clear that the Respondents' Motions were granted because they were private parties participating in private State Court litigation and were not acting under color of law and could not be held liable under *42 United States Code 1983*. (R-343).

(b) The Statement of Facts:

A correction of Petitioner's Statement of the Case defies performance. In the first instance, for purposes of this present appeal, a lengthy Statement of the Case is not necessary since a procedural issue is involved. However, more importantly the facts presented by the Petitioner were inappropriately presented in that there are absolutely no citations to the place in the Record where those facts are established and in essence, the facts are nothing more than bare conclusions and a recitation of the Petitioner's Complaint. (See Petitioner's Brief)

Respondents respectfully submit that Statement of the Case is only necessary in the present appeal to the extent that they show the identical nature, or the absence of an identical nature, between the two Complaints and therefore the appropriateness of the utilization of the *Doctrine of Res Judicata* by the Trial Court. The Respondents refuse to encumber this Court with a naked recitation of the contentions contained in the Respondents' answers which would be the only means of responding to the paragraph by paragraph recitation of Petitioner's bare conclusions with regard to the facts in this case.

Consequently, Respondents will simply, in the Argument and Citation portion of this Brief, provide the Court with the facts (and their location in the Record) necessary to demonstrate the identical nature of these

two Complaints and the appropriateness of the Court's ruling in barring the second Complaint on the theory of res judicata.

SUMMARY OF ARGUMENT

The Court below properly granted the Respondents' Motions for Summary Judgment and properly ruled that the present Complaint is barred by the *Doctrine of Res Judicata*. The two Complaints filed by the Petitioner are identical even down to the prayers for relief, arise from the same set of facts, and contain the same contentions and name the same parties.

In a diversity action in the United States District Court the issues of res judicata, collateral estoppel and estoppel by judgment are governed by the applicable State law. The applicable Georgia Law on the Doctrine of Res Judicata serves as a bar to the present action by the Petitioner. All of the requirements of the Georgia Statute are met; there was a prior Judgment by a Court of competent jurisdiction, the prior case involved the same parties and the Judgment in that case was decisive as to any matters put in issue or any matters which might have been put in issue. See: *Georgia Code Annotated* §110-501.

Petitioner's entire analysis is inappropriate since it ignores the fact that the Doctrine of Res Judicata is controlled by State law. Petitioner attempts to circumvent this requirement by contending that the dismissal for

failure to state a claim upon which relief can be granted was in fact jurisdictional. That argument is totally unsupportable since to rule that the dismissal was jurisdictional deprives the section relating to dismissal for failure to state a claim of any meaning.

The great weight of Georgia decisions and decisions of this Court decide the present issue adversely to the Petitioner and call for an affirmance of the Opinion below.

ARGUMENT

I.

The Court Below Was Correct In Ruling That The Present Action Is Barred By The Doctrine Of Res Judicata And Granting Motions For Summary Judgment In Favor Of The Respondents Identified Herein And Dismissing The Present Action.

(A) IN A DIVERSITY ACTION IN THE UNITED STATES DISTRICT COURT, THE ISSUES OF RES JUDICATA, COLLATERAL ESTOPPEL, AND ESTOPPEL BY JUDGMENT ARE GOVERNED BY THE APPLICABLE STATE LAW.

It has now been uniformly established that in a diversity case, the law of the State where the District Court sits controls the issues of res judicata and collateral estoppel. See the Fifth Circuit case of *Breeland v. Security*

Insurance Company of New Haven, Connecticut, 421 F.2d 918 (5th Cir. 1969); and the Eighth Circuit case of *Richie v. Landau*, 475 F.2d 151 (8th Cir. 1973). Finally, see the Fifth Circuit case of *Janelle v. Sea Board Coastline Railroad*, 524 F.2d 1259 (5th Cir. 1975). Not only is Georgia Law applicable; Respondents will demonstrate that the applicable Georgia Law prevents the maintenance of this second action by the Petitioner, Pleasant Richard Tally.

Petitioner's Statement of the Case, Reasons for Granting Writ, and Conclusion are self-defeating in this regard. Petitioner states the issue this way:

> I. Whether dismissal of a suit under 42 U.S.C.A. for failure to establish the existence of state action should be construed as a dismissal for lack of jurisdiction under F.R.C.P. 41(b) such that a second suit based on similar facts would not be barred by the doctrine of res judicata?

The fallacy in this Statement of the Issue is that the matter is controlled by State law, a matter which the Petitioner never addresses.

The issue contains a further fallacy in that it would have this Court simply convert a dismissal for failure to state a claim upon which relief could be granted into a dismissal on jurisdictional grounds. There is absolutely no authority for the treatment of the dismissal in this

manner and the original Order of the Trial Court in the first action makes it abundantly clear that the dismissal was a dismissal upon the merits for failure to state a claim upon which relief could be granted, and not a dismissal for lack of jurisdiction. (R-343)

(B) APPLICABLE GEORGIA LAW ON THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND ESTOPPEL BY JUDGMENT SERVE AS A BAR TO THE PRESENT ACTION BY THE PETITIONER.

The applicable statute in Georgia on the issue of res judicata is *Georgia Code Annotated* §110-501, which provides:

> "A Judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matter put in issue or which, under the rules of law, might have been put in issue, and the cause wherein the Judgment was rendered, until such Judgment shall be reversed or set aside."

A brief analysis of the present situation will demonstrate that the requirements of the *Code* section have been met in every respect.

1.

There is, in the present case, a Judgment of a Court of competent jurisdiction. The Georgia statute requires such a Judgment. The fact that there is a prior Judgment is not subject to dispute. (R-343)

In his Brief, Petitioner contends that the prior Judgment constituted only a jurisdictional decision and was not a decision on the merits. This is an effort by the Petitioner to confuse this Court by contending that the dismissal in the original suit was jurisdictional only. Petitioner is simply grasping at the word "jurisdictional" because the Trial Court used the term in its first Opinion in concluding that the State Court Judge had jurisdiction to entertain a divorce proceeding. The Order in the original case reveals on its face that the dismissal was a dismissal on the merits for failure to state a claim upon which relief could be granted and not a dismissal based upon an absence of jurisdiction in the court. (R-343)

Petitioner's position cannot be sustained under applicable Georgia law or under the Federal Rules. Georgia Courts construing the *Code* sections cited above have concluded that a dismissal for failure to state a claim upon which relief can be granted is a dismissal upon the merits and consequently a bar to any subsequent action arising from the same set of facts. In the case of *Adams v. Travelers Insurance Company*, 114 Ga.App. 276 (1966), the Court of Appeals for the State of Georgia was confronted with a case similar to the present one. A first action in that case had been dismissed for a failure to state a claim upon which relief could be granted. On the issue of res judicata, the Court concluded:

> "The Order of March 5, 1965, dismissing the plaintiff's first suit constituted an adjudi-

> cation on the merits that the plaintiff's petition did not state a cause of action for any relief, legal or equitable, arising out of the facts therein, and since the plaintiff's second suit was clearly predicated upon the same cause of action and was between the same parties, the Trial Court did not err in sustaining the defendant's plea of res judicata."

It is clear that under Georgia law, a dismissal of a case for failure to state a claim upon which relief can be granted is an adjudication of a case on its merits and not a jurisdictional ruling.

Moreover, the applicable Federal Rule resolves the question beyond all doubt. *Rule 41(b)* of the *Federal Rules of Civil Procedure* provides:

> "Unless the Court, in its order of dismissal, otherwise specifies, a dismissal under this subdivision and any dismissal not provided for under this Rule other than a dismissal for lack of jurisdiction, improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits."

The Fifth Circuit has construed this *Rule* to embrace cases which have been dismissed for failure to state a claim for which relief can be granted. In the Fifth Circuit case of *Hall v. Tower Land & Investment Company*, 512 F.2d 481 (5th Cir. 1975), this Court concluded:

> "The trial court's dismissal of Hall's first complaint under the Federal Rules of Civil Procedure 12(b) falls directly under the wording of Rule 41(b), and cases have held that such decisions operate as adjudications on the merits."

Consequently, whether looking to the applicable Georgia law or to the *Federal Rules of Civil Procedure*, it is clear that the first requirement of the Georgia statute on res judicata has been satisfied. There is a Judgment by a Court of competent jurisdiction and under all existing authorities, that Judgment constituted an adjudication of the first case on its merits.

2.

The Georgia statute provides that a prior Judgment is conclusive between the same parties and their privies. There can be no question that this portion of the Georgia res judicata statute is also satisfied. The pleadings reveal on their face that the plaintiff in the original action in the Northern District of Georgia (Civil Action Case No. C77-359 A) was Pleasant Richard Tally and the defendants were William P. Johnson, Homer Williams, Aubrey W. Gilbert and Lamar Knight. (R-335) Likewise, the pleadings in the present action (Civil Action Case No. C77-2008 A, in the District Court) reveal on their face that the plaintiff is also Pleasant Richard Tally, and that the defendants are William P. Johnson, Aubrey W. Gilbert and Homer Williams. (R-5) Only State Court Judge Lamar Knight

has been excluded as a party in this second action. Consequently, the identity of the parties requirement has clearly been met.

3.

Under the Georgia res judicata statute, a prior Judgment is conclusive not only as to all matters put in issue, but as to all matters which might have been put in issue under the rules of law.

It is in this area that the Petitioner has demonstrated a consistent inability to understand the doctrine of res judicata. While the Petitioner has never denied that both of these actions center around and arise from the same set of facts and the same transaction, the Petitioner insists that he is entitled to maintain both because he labeled them with separate theories. Under the Georgia res judicata statute, that argument becomes immaterial. Under that statute, the Petitioner was bound not only by the legal theory he litigated in the first action, but by any other legal theory he could have litigated arising from that same set of facts. It is of no consequence that Petitioner's first claim was styled as a civil rights action and his second claim purports to proceed under fraud and related theories. That was the ruling of the Court below. (R-944)

A brief comparison of the two Complaints reveal that they are identical in every respect except for what the Petitioner has chosen to call them. (R-5, 335) All the parties in the present action were parties in the first ac-

tion. Both Complaints center around an alleged ownership interest in the same corporation by the Petitioner. Both Complaints assert a scheme of fraud and conspiracy to defraud on the part of all the Respondents. Both Complaints contend that the Petitioner was deprived of his stockholder interest and his right to earn a living as a result of alleged fraud. Both Complaints allege that all the damages arose out of a divorce action heard by Judge Lamar Knight in the Superior Court of Carroll County, Georgia. Both Complaints allege a firing of the Petitioner from his corporation by the Respondent, William P. Johnson. Both Complaints contend that the Petitioner was illegally restrained from entering the premises of Style Crest and allege a scheme of fraud between the Respondents to acquire the assets of Style Crest by purchase at a Federal Tax Sale. Both Complaints allege misrepresentations by the Respondents during the divorce proceedings and both allege fraudulent statements contended to have been made by all of the Respondents. Finally, in both Complaints, the prayers for relief are substantially the same, although they have been inflated in the second suit. (R-5, 335)

In short, both Complaints arose from the same factual situation and the same transaction. They are identical in every regard and that has never been denied. Even if the Petitioner did have a claim based upon fraud separate from the fraud upon which he purported to base his civil rights action, he was required under the Georgia res judicata statute, to have raised those claims in the first action.

The Georgia Supreme Court expressed the position of the Respondents best in the case of *Turner v. Harper*, 234 Ga. 891 (1975):

> "No party, plaintiff or defendant, is permitted to stand his case before the court on some of its legs, and if it falls, set it up again on the rest in a subsequent proceeding, and thus evade the bar of the former judgment."

That is precisely what the Petitioner seeks to do in the present action. If the Petitioner had other theories, upon which his case rested, he was bound to have presented those theories to the Court in the first action. His failure to do so prevents him from raising those theories at this point. Petitioner has yet to provide this, or any other Court, with any explanation for why he could not have included the present claims in the first action filed by Petitioner. The Federal Court clearly had diversity jurisdiction at that point, just as it has diversity jurisdiction now, since the same parties were involved. In the 1976 case of *Henderson v. Marta*, 236 Ga. 849 (1976), the Supreme Court concluded:

> "The judgments above referred to are res judicata of all issues which were included or might have been included in those actions. [*Code* 110-501] Henderson's pleadings and evidence in the present case do not show that his present motion to set aside the judgment deciding the validity of the referendum raises

any issue which could not have been included in the previous action. It was not in error for the Judge to validate the bonds while this motion to set aside was pending."

The essential point made by the previous case is that the pleading and evidence in the present case do not show that the present complaint contains any issue which could not have been raised in the previous action.

In other cases the Courts of this State have made it abundantly clear that where a second suit touches the same subject matter as a prior suit, *Georgia Code Annotated* §110-501 operates to prevent the second suit. In *Miami Properties, Inc. v. Fitts*, 226 Ga. 300, the Supreme Court concluded:

"The instant suit is between the same parties or their privies, and involves the same subject matter and substantially the same prayers for relief as were in an earlier case. Therefore, it was not error to sustain the pleadings of res judicata."

See Also: *Meyers v. United Service Auto Association, Inc.*, 130 Ga.App. 357 (1973); and *Colodny v. Krause*, 136 Ga.App. 379 (1975).

The Fifth Circuit in construing a statute identical to Georgia's (the Texas Statute) has reached the same

conclusion drawn by the Respondents in the present case. In *Hall v. Tower Land & Investment Company*, 512 F.2d 481 (5th Cir. 1975), the Court concluded:

"Even if Hall had pleaded only the trust theory of recovery in her first complaint, res judicata would still prohibit re-litigation of her claim on a quiet title theory in a subsequent action. For in both Federal Courts and Texas State Courts, a judgment is final not only as to all matters which were decided, but also as to all matters which might have been tried."

That case is identical in every respect to the present case. The Petitioner's efforts to change theories in seeking recovery from the same transaction was rejected and barred under the doctrine of res judicata. For another Fifth Circuit case, see *Acre v. Airline Pilots Association*, 390 F.2d 199 (5th Cir. 1968), in which the Court concluded:

"Thus the civil action relied on in the second litigation, and the one here, are identical. The remedy requested is also identical. True the identical words have not been used; the complaints were prepared by different lawyers, but essentially they are the same. What difference exists is in form, and we have long held that in determining res judicata, it is the substance of the action that counts. What is important and determinative now as to the

identity of causes of action is not an identity of form, but of grounds."

Petitioner's position in the present matter is totally untenable. Petitioner has never denied that both of these cases arise from the same set of facts. That both cases do arise from the same set of facts is apparent on the face of both complaints. Consequently, under all existing state and federal authority, the Petitioner was bound by the judgment in the first action as to any issues litigated in that action, and any issues which he might have litigated in that action.

4.

Under the Georgia res judicata statute, a prior judgment is conclusive until it is reversed or set aside. This may be dealt with summarily since the judgment Respondents contend bars the present action has been neither reversed nor set aside. In fact, the first action terminated when the United States Supreme Court denied Certiorari.

In brief summary of this portion of Respondents' Brief, every requirement of *Georgia Code Annotated* §110-501 has been satisfied for purposes of asserting the conclusiveness of the prior judgment in the first action filed by Petitioner. There is a judgment by a Court of competent jurisdiction between these same parties which has not been reversed or set aside, and which is conclusive upon the Petitioner as to all matters put in

issue and all matters that the Petitioner could have put in issue at that time.

(C) THE PETITIONER'S LIMITED AUTHORITY DOES NOT SUPPORT HIS ARGUMENT AND HIS RELIANCE ON THAT AUTHORITY IS MISPLACED.

The Petitioner's reliance on what little authority he cites is misplaced. Petitioner cites *Stump v. Sparkman*, 98 S.Ct. 1099 (1978), for the proposition that this Court could construe the dismissal for failure to state a claim upon which relief could be granted as a dismissal on jurisdictional grounds. *Stump v. Sparkman*, supra, cannot possibly be used for that proposition. That case addresses that issue of jurisdiction in a totally different vein. In *Stump v. Sparkman*, supra, the Court concludes only that the Judge was acting within his jurisdiction in rendering the Order of sterilization and therefore his immunity remained intact. That case does not address or purport to address the proposition asserted by the Petitioner in the instant matter.

The remaining cases cited by the Petitioner merely conclude that once a case has been dismissed on some procedural grounds in Federal Courts, that the plaintiff may be left to pursue whatever remedies may exist in the State Courts. The key words here are "whatever remedy may exist." As indicated by the great weight of authority and analyzed in this Brief, no remedies exist for the Petitioner in the present case by virtue of the operation of Georgia's res judicata statute as embodied in *Georgia Code Annotated* §110-501.

For all the foregoing reasons, Respondents respectfully submit that the decision of the Court below was proper and should be affirmed.

CONCLUSION

The Respondents submit that the Trial Court below correctly decided the issue and disposed of the case on the theory of res judicata. As the Trial Court points out, the issue of res judicata is controlled by applicable State law and under applicable State law, the present action is clearly barred by the decision on the merits in the first action which was identical in nature. There is absolutely no authority for Petitioner's circuitous effort to have this Court construe the dismissal for failure to state a claim upon which relief could be granted as a dismissal on merely jurisdictional grounds.

For the foregoing reasons the Respondents respectfully submit that the decision of the Trial Court granting the Respondents' Motions for Summary Judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that three copies of the above and foregoing Brief of Appellees, William P. Johnson, Aubrey W. Gilbert and Homer Williams, have been forwarded to counsel for the Appellant, to-wit:

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This the ____ day of August, 1979.

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